No. 04-748

Supreme Court, U.S.
FILED
FEB 2 - 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Petitioner

v.

ADAM BARBOUR, AND THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Because the Petitioner, Washington Metropolitan Area Transit Authority (WMATA), omitted certain facts from its statement of the case, Adam Barbour submits this abbreviated supplemental statement. WMATA fired Adam Barbour, one of its electricians, in April 1998, without giving him a reason. After Barbour brought suit, WMATA claimed a variety of reasons for his termination. Barbour claimed WMATA fired him because of his mental disability, bipolar disorder, in violation of the District of Columbia Human Rights Act, the Americans with Disabilities Act, and §504 of the Rehabilitation Act of 1974, 29 U.S.C. §794. After WMATA successfully disposed of Barbour's Human Rights Act claim, the United States District Court for the District of Columbia appointed counsel for Barbour. After discovery closed, WMATA moved for summary judgment on Barbour's remaining claims, alleging that Barbour did not have a disability within the meaning of the ADA, that he was not fired because of his disability, that WMATA was immune from suit under the Eleventh Amendment, and that WMATA's individual codefendants, the officers and managerial employees who participated in Barbour's termination, are not liable for claims under the Rehabilitation Act and the ADA

The District Court found that Barbour had stated an issue of material fact as to his disability, that WMATA is immune from suit under the ADA, and that the individual defendants should be dismissed because they are not "employers" under the ADA and the Rehabilitation Act. On WMATA's motion for clarification, the District Court wrote a separate opinion, holding that WMATA was not immune from suit under the Rehabilitation Act. WMATA took an

interlocutory appeal on the immunity issue. The Court of Appeals for the District of Columbia Circuit affirmed, *Barbour v. WMATA*, 374 F.3d. 1161 (D.C. Cir. 2004), and denied WMATA's request for rehearing *en banc*.

With the approval of Congress, Maryland, Virginia and the District of Columbia entered into an interstate compact which created WMATA. By the terms of that compact, WMATA is immune from suit under the discrimination laws of Maryland, Virginia and the District of Columbia, the signatories thereto. Although the Compact does not provide for immunity from claims based on federal law, the United States Court of Appeals for the District of Columbia Circuit has decided that WMATA enjoys Eleventh Amendment immunity, conferred upon it by Maryland and Virginia.

WMATA has received federal funding in every year of its existence. While WMATA has admitted this fact throughout this litigation, it has never presented any evidence or argument considering the nature of the funding it receives. In its petition, WMATA argues, without any support, that it receives block grants "to further capital projects and to finance the planning and improvement of transit equipment and facilities" (*Petition, p. 10).* In fact, WMATA has consistently received federal funds for operating expenses, in addition to the funds it received for construction of the Metro subway system. Through the end of 1997, 49 U.S.C. §5307 specifically authorized grants for operating assistance. In 1997, $126,055,688 was apportioned to WMATA under 49 U.S.C. §5307. FTA Fiscal Year 1997 Apportionments and Allocations, 61 Fed. Reg. 52500, 52511 (1997).

In 1998, Congress passed the Transportation Equity Act for the 21st Century, Pub.L.No. 105-178, 112 Stat. 107,

which eliminated express authorization for grants of operating expenses to transit agencies, such as WMATA, located in urban areas of over 200,000 people. The Federal Transit Agency continued to make grants for capital projects, however, and the definition of capital project was expanded to include preventive maintenance. FTA Transit Program Changes and Final Funding Levels for Fiscal Year 1998 Under the Transportation Equity Act for the 21st Century, 63 Fed. Reg. 34506, 34509 (1998). WMATA therefore could continue to receive funds for maintenance expenses. The Federal Transit Agency apportioned over $76 million dollars to WMATA in 1998, pursuant to 49 U.S.C. §5307. *Id*, p. 34515 (1998). As Barbour was an electrician employed in maintaining WMATA facilities, federal funds could have been used to pay his salary, a fact which he argued to the court below.

REASONS FOR DENIAL OF THE PETITION

The petition should be denied because the Court of Appeals correctly followed this Court's Spending Clause jurisprudence, and neither logic nor fairness compels the additions to that jurisprudence which WMATA advocates. In deciding that Congress acted within its Spending Clause powers when it enacted the Civil Rights Remedies Equalization Act (CRREA), 42 U.S.C. §2000d-7, the Court of Appeals for the District of Columbia Circuit joined eleven other federal circuits. The court below applied the factors this Court has set forth for determining the validity of Spending Clause legislation. Its decision contravenes neither the letter nor the spirit of this Court's decisions on the subject of the Spending Clause or Eleventh Amendment immunity.

WMATA contends that the decision below allows Congress to impinge on states' reserved powers, in defiance of this Court's Tenth Amendment jurisprudence. There is no reason to consider the Tenth Amendment in this case. While the Court of Appeals decided that WMATA enjoys Eleventh Amendment immunity, as a gift from the states which created it, WMATA is not a state. It cannot regulate, it has no reserved powers, and it is not protected by the Tenth Amendment. Yet on that basis it asks this Court to import a new test into the consideration of Spending Clause legislation, a measure of "relatedness" or nexus between the legislation and the goals of funding, a standard derived from this Court's Commerce Clause and Fourteenth Amendment jurisprudence. Even were a state, protected by the Tenth Amendment, to request such an addition to the law, there would be no reason to accede.

WMATA argues secondly that this Court should follow the Second Circuit and establish a new test for deciding whether a state has knowingly accepted a condition on federal funds. This Court holds that a state knowingly accepts a condition if the condition is stated unambiguously. WMATA asks this Court to examine as well the objective or subjective state of mind of the state at the time it accepts funds, and to consider whether the entity believed or had reason to believe that its immunity had already been abrogated. Adding another element to the definition of "knowing", as WMATA advocates, would mark a departure from this Court's Spending Clause decisions. The Court of Appeals decided there was no reason to deviate from this Court's decisions. Although all circuits to have decided the issue finally disagree with the Second Circuit, the subject matter of the disagreement does not reach an important federal question because the issue would only have arisen in a limited historical fact situation. The additional inquiry for which WMATA argues focuses on a state's belief

that the immunity it would waive was already abrogated. At best, the could succeed only in cases which arose before this Court decided *City of Boerne v. Flores,* 521 U.S. 507 (1997) and *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996). As the court below recognized, this case arose after those decisions. The court below considered WMATA's argument and rejected it on the facts of this case. Even had the court below adopted WMATA's proposed additional condition, the outcome in this case would have been the same.

I. THERE IS NO NEED FOR THIS COURT TO DEFINE MORE SPECIFICALLY THE LIMITS OF CONGRESS' SPENDING CLAUSE POWERS, BECAUSE THE COURT OF APPEALS CORRECTLY DECIDED THAT THOSE LIMITS HAVE NOT BEEN REACHED IN THIS CASE

After analyzing the factors set forth in *South Dakota v. Dole,* 483 U.S. 203 (1987), the Court of Appeals found that Congress acted within its Spending Clause power when it enacted the CRREA. With this decision, the circuits are unanimous. *Nieves Marquez v. Commonwealth of Puerto Rico,* 353 F.3d 108 (1st Cir. 2003); *Koslow v. Commonwealth of Pennsylvania,* 302 F.3d 161 (3d Cir 2002), *cert. denied sub nom Pennsylvania Department of Corrections v. Koslow,* 537 U.S. 1232 (2003); *Robinson v Kansas,* 295 F.3d 1183, 1189-90 (10th Cir. 2002), *cert. denied* 539 U.S. 926 (2003); *Nihiser v. Ohio Environmental Protection Agency,* 269 F.3d 626 (6th Cir. 2001), *cert. denied sub nom Ohio Environmental Protection Agency v. Nihiser,* 536 U.S. 922 (2002); *Garcia v. SUNY Health Sciences Center of Brooklyn,* 280 F.3d 98 (2d Cir. 2001); *Jim C v. United States,* 235 F.3d 1079 (8th Cir 2000), *cert. denied* 533 U.S. 949 (2001); *Pederson v. Louisiana. State*

University, 213 F.3d 858, 875-76 (5th Cir. 2000); *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Litman v. George Mason Univ.*, 186 F.3d 544, 554 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000); *Sandoval v. Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), *reversed on other grounds*, *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Clark v. State of California*, 123 F.3d 1267 (9th Cir. 1997).

Congress' power under the Spending Clause, U.S. Const., art. I, §8, cl. 1, is subject to "several general restrictions": the exercise of power must be in pursuit of the general welfare, conditions imposed on the receipt of federal funds must be unambiguous, and other constitutional provisions may provide an independent bar. *South Dakota v. Dole, supra*, 483 U.S. 203, 207.[1] The Court also noted that:

> our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion). *See also Ivanhoe Irrigation Dist. V. McCracken, supra*, at 295 ("The federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof").

Id., p. 208.

Below, WMATA claimed that the condition imposed by the CRREA, waiver of a state's Eleventh Amendment

[1] WMATA has never contended that the CRREA was not enacted in pursuit of the general welfare.

immunity, was ambiguous, because the statute used the language of abrogation, not waiver. The Court of Appeals rejected this argument, pointing to the very language of the statute, and WMATA abandons it here. [2] WMATA also argued that the CRREA is unenforceable because its condition, is not related to the purpose of federal transit appropriations. The Court of Appeals rejected this argument as well, noting that it did "not break any new ground in doing so." *Barbour v. WMATA,* 374 F.3d 1161, 1169 (D.C. Cir 2004). Seizing on language from the dissenting opinion, WMATA now takes its argument into uncharted waters: it argues that the "federal interest" test would only be met if a "direct relationship" or a "reasonably close relationship" could be identified between the purpose of transit appropriations and the condition of waiver of immunity in employment discrimination lawsuits, evidenced by language in a particular appropriations bill.[3] (*Petition,* pp. 10, 12, 13)

WMATA argues for a definition of the relationship between the objective and the purpose of the funds more rigid than any this Court has ever employed. In *Conrail v. Darrone,* 465 U.S. 624 (1984) this Court rejected an argument similar to

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[2] Altered somewhat, the argument now makes its appearance in connection with WMATA's second contention, with WMATA claiming now that its receipt of federal funds in 1998 could not be knowing because the "abrogation language" of the CRREA deceived it into believing it had no immunity to waive.

[3] Both §504 of the Rehabilitation Act and the CRREA apply outside the context of employment claims. WMATA's argument carefully avoids the question of whether a more direct or reasonable connection between the purpose of the funds and the condition of waiver would exist in a case in which the plaintiff claimed WMATA denied him access to the subway because of his disability.

that made here, and held that §504 of the Rehabilitation Act applies even when the federal funds received are not related to employment. In *South Dakota v. Dole, supra,* a case involving transit funds, the Court declined an invitation to "establish that a condition on federal funds is legitimate only if it relates directly to the purpose of the expenditure to which it is attached". *Id.*, p. 209, n.3. WMATA now issues another invitation, asking this Court to impose a condition derived from, or perhaps based on, the "congruence and proportionality" test applied to Congress' exercise of its powers under §5 of the Fourteenth Amendment. *Tennessee v. Lane*, 541 U.S. 509 (2004) (applying the test to Title II of the Americans with Disabilities Act). In the alternative, WMATA suggests that this Court graft onto its Spending Clause jurisprudence the "substantial effect" analysis it employs in analyzing Congress' exercise of its powers under the Commerce Clause, Article I, §8, cl.3. *United States v. Morrison*, 529 U.S. 598 (2000).

This Court should once again decline the invitation, because the Court of Appeals decided this case correctly, and because this case, involving neither a state nor a disguised federal attempt at regulation, presents no compelling reason to embellish this Court's existing jurisprudence with concepts derived from other areas of the law.

This Court has consistently recognized that Congress has the power, incident to its powers under the Spending Clause, "to further broad policy objectives by conditioning the receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole, supra,* 483 U.S. 203, 206; *United States v. American Library Ass'n*, 539 U.S. 194, 203 (2003). Following the precedent this Court set in *Lau v. Nichols,* 414 U.S. 563

(1974) and *Grove City College v. Bell,* 465 U.S. 555 (1984), the Court of Appeals found that Congress has the power under the Spending Clause to prohibit discrimination in activities receiving federal funds. The holding recognizes nothing more radical than the concept that "within broad limits, when the government appropriates public funds to establish a program, it is entitled to define the limits of that program. *United States v. American Library Ass'n., supra,* 536 U.S. 194, 211, *quoting Rust v. Sullivan,* 500 U.S. 173, 194 (1991). Congress has the power to decide how its transit funds will be used. It exercised this power when it imposed on states the condition upheld in *South Dakota v. Dole, supra.* In the Rehabilitation Act, it imposed a requirement that those receiving transit funds-- funds which were made available for WMATA's operating expenses-- cannot discriminate in the hiring and firing of people paid with those funds. The CRREA provides a necessary remedy for those affected by a state recipient's breach of the condition.

In *South Dakota v. Dole,* 483 U.S. 203, 207 (1987), this Court reiterated its longstanding distinction between Spending Clause powers and other legislative powers:

> "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." Thus, objectives not thought to be within Article I's "enumerated legislative fields," *id., at 65,* may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.

South Dakota v. Dole, supra, 483 U.S. 203, 207 (quoting

United States v. Butler, 297 U.S. 1, 66 (1936)). *See also College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,* 527 U.S. 666, 687 (1999). Because the Court's Spending Clause powers are broader, the use of tests derived from the Court's Fourteenth Amendment and Commerce Clause decisions simply have no place. *See Sabri v. United States,* 541 U.S. 600, 124 S.Ct. 1941, 1947 (2004).

Even if WMATA's argument were generally supportable, this case, in particular, would provide a poor occasion for the Court to make the sort of leap that WMATA advocates. WMATA makes a policy argument for the adoption of its position, raising the specter of a Congress freed to circumvent states' rights "at will", but WMATA is not a state. It has no reserved powers. It cannot legislate.[4] The Tenth Amendment does not apply to it. The dangers of Federal intrusion into the realm of police powers reserved to the states, as described in *United States v. Morrison, supra*, simply do not exist here.

Even if WMATA were a state, the CRREA is not the sort of provision which could fairly be characterized as an attempt to mandate state regulation, such as the provision struck down in *New York v. United States,* 505 U.S. 144 (1992). WMATA does not claim that Congress exceeded its Spending Clause powers in enacting the Rehabilitation Act. Its claims attack only the remedy provisions of the CRREA. While WMATA raises the specter of unfettered congressional

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[4] Unlike the states, which are subject to their own statutes prohibiting discrimination based on disability, *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S.356, 368, n.5 (2001), WMATA cannot be sued under any state or federal law prohibiting disability discrimination in employment, except §504 of the Rehabilitation Act.

regulation, then, it does not claim that Congress is making any illegal attempt to regulate its conduct in this case. [5]

II. WMATA'S CONTENTION THAT IT DID NOT KNOWINGLY WAIVE ITS IMMUNITY DOES NOT RAISE AN ISSUE OF SUCH IMPORTANCE AS TO MERIT REVIEW BY THIS COURT

WMATA argued below that it had reason to believe, as of 1998, that its Eleventh Amendment immunity had been abrogated by the Americans with Disabilities Act, 42 U.S.C §12202, and by the CRREA. It claims that it could not knowingly waive its Eleventh Amendment immunity from suits under the Rehabilitation Act when it accepted Federal funds, because it believed it had none to waive. WMATA relies upon the opinion of the Court of Appeals for the Second Circuit in *Garcia v. SUNY Health Sciences Center of Brooklyn, supra,* 280 F.3d 98.

The Court of Appeals rejected this argument, joining every circuit but one to have considered the question. *Nieves Marquez v. Commonwealth of Puerto Rico, supra,* 353 F.3d 108, 130 (1st Cir. 2003); *Doe v. State of Nebraska,* 345 F.3d 593, 601-602 (8th Cir. 2003); *Garrett v. University of Ala. at Birmingham Board of Trustees,* 344 F.3d 1288, 1292-93 (11th Cir. 2003); *A.W. v. Jersey City Public Schools,* 341 F.3d 234, 252 (3d Cir. 2003); *Miranda B. v. Kitzhaber,* 328 F.3d 1181,

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[5] Instead, WMATA suggests that Barbour could pursue a claim for injunctive relief against the dismissed individual defendants under *Ex Parte Young,* 209 U.S. 123 (1908), which would adequately vindicate the federal interest in elimination of discrimination. *Petition,* p. 10, fn. 2.

1186 (9th Cir. 2003)[6]. The Fifth Circuit initially adopted *Garcia*'s reasoning in *Pace v. Bogalusa City School Board*, 325 F.3d 609, *reh. en banc granted* 339 F.2d 348 (5th Cir. 2003), but has vacated its decision and granted rehearing *en banc*. *Id.*; *Miller v. Texas Tech University Health Sciences Center*, 330 F.3d 691, *reh. en banc granted* 342 F.3d 563 (5th Cir. 2003).

The court below reached its conclusion by analyzing this Court's decisions. *Barbour v. WMATA, supra*, 374 F.3d 1161, 1166-67. This Court has focused solely on the clarity of Congress' statement of condition as the one factor which facilitates the states' knowing acceptance. "By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). This Court has never suggested a factual inquiry into the State's belief as of the time it accepted federal funds.

WMATA advocates the adoption of just such an additional inquiry. If its argument were accepted, every Spending Clause case would include an inquiry into the objective or subjective state of mind of the entity accepting federal funds. This Court has consistently characterized Spending Clause legislation as "much in the nature of a contract." *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). Imposition of WMATA's proposed condition would open the door to an inquiry into the question of how the state entity

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[6] The Fourth Circuit also rejected the argument in an unpublished opinion, *Shepard v. Irving*, 77 Fed. Appx. 615, 2003 U.S. App. Lexis 17049 (4th Cir. 2003), *cert. dismissed* sub nom *Rector and Visitors of George Mason University v. Shepard*, 125 S.Ct. 22, 159 (2004).

evaluated the cost of the Federal benefit it was receiving, or of how a reasonable state entity in its position would have made that evaluation.

WMATA claims a conflict exists between the circuits on this issue. Although the Second Circuit's opinion in *Garcia* varies from that of the majority of circuits, the question involved cannot be characterized as "important" within the meaning of Rule 10 of the Rules of this Court, because it has such a limited application. Even if the Second Circuit's analysis were correct, it would not apply to cases arising in the years after 1995, because the decisions of the Circuits and of this Court would have put states on notice by then that their immunity had not been abrogated. *Barbour v. WMATA, supra,* 374 F.3d 1161, 1167. "The rationale of *Pace*, in other words, applies to a limited number of historical cases as a result of fast-developing sovereign-immunity jurisprudence at Supreme Court [*sic*] and this court." *Miller v. Texas Tech University Health Sciences Center, supra,* 330 F.3d 691, 695, n. 9.

The court below found that the rationale could not apply in this case, however. The court rejected WMATA's argument for three reasons, two of which were fact-based. The court noted that the state of the law in 1998 put WMATA on notice that abrogation of its immunity under the ADA might be invalid. WMATA itself, aware of the state of the law, was already using the law to argue that it was immune from suit under the Age Discrimination in Employment Act. *Barbour v. WMATA, supra,* 374 F.3d 1161, 1167-1168. [7] Whether or not

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[7] Based on its conduct both before passage of the Americans with Disabilities Act and after this Court's opinion in *Board of Trustees of the University of Alabama v. Garrett, supra,* 531 U.S. 356, the Court also found that WMATA would have accepted the funds whether or not they were conditioned on a waiver of immunity. *Id.*

the rationale of *Garcia* is used, then, the result, on the fact of this case is the same.

CONCLUSION

Twelve circuit courts agree that Congress acted well within its powers under the Spending Clause when it enacted the CRREA. WMATA has given this Court no compelling reason to overturn those decisions. The Court of Appeals decided that WMATA accepted federal funds with knowledge of the unambiguous condition imposed on them, that WMATA would be subject to suit under §504 of the Rehabilitation Act. Correct on both the facts of this case and the law, the decision creates no conflict on an important federal question. Barbour respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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